

NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND  
MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.  
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24

FILED BY CLERK

OCT-4 2012

COURT OF APPEALS  
DIVISION TWO

IN THE COURT OF APPEALS  
STATE OF ARIZONA  
DIVISION TWO

THE STATE OF ARIZONA,	)	2 CA-CR 2012-0332-PR
	)	DEPARTMENT A
Respondent,	)	
	)	<u>MEMORANDUM DECISION</u>
v.	)	Not for Publication
	)	Rule 111, Rules of
WALLACE ALBERT BEGAY,	)	the Supreme Court
	)	
Petitioner.	)	
_____	)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF COCONINO COUNTY

Cause No. CR20091017

Honorable Joseph J. Lodge, Judge

REVIEW GRANTED; RELIEF DENIED

David W. Rozema, Coconino County Attorney  
By Serena Serassio

Flagstaff  
Attorneys for Respondent

Wallace A. Begay

Kingman  
In Propria Persona

ECKERSTROM, Presiding Judge.

¶1 Charged with criminal damage, threatening or intimidating, and three counts of aggravated assault, petitioner Wallace Begay pled guilty pursuant to a plea agreement to one count each of aggravated assault and criminal damage. He was

sentenced to concurrent prison terms of 3.5 years and one year. Begay filed a notice of post-conviction relief, after which appointed counsel filed a notice pursuant to Rule 32.4(c), Ariz. R. Crim. P., stating she had found no colorable claim to raise. In his pro se petition, Begay asserted his trial counsel had been ineffective. The trial court summarily dismissed the petition, and this petition for review followed. “We will not disturb a trial court’s ruling on a petition for post-conviction relief absent a clear abuse of discretion.” *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no such abuse here.

¶2 In establishing a factual basis for the plea, Begay admitted he had followed closely behind the car driven by one of the victims until she stopped at a parking lot, where he got out of his truck, “yelled” at her for using her high-beam headlights, and broke two windows of her car with a crowbar, threatening the three occupants. Begay claimed he had believed the victim had been “tailgating him aggressively” before Begay began “tailgating” the victim. In his petition for post-conviction relief, Begay seemed to argue trial counsel had been ineffective for failing to investigate whether he had been under the influence of alcohol and drugs when he became enraged and committed the offenses, stating he possibly inhaled secondhand smoke the night before when a woman with whom he had spent the night had smoked a “danger[.]ous drug” Begay believed contained “P.C.P.,” presumably referring to phencyclidine. Begay also seemed to suggest counsel had failed to utilize other evidence that would have supported Begay’s version of the events of that night and other events that preceded and culminated in the offense. Although Begay did not specify how this had affected the validity of the plea,

presumably he was asking the court to set aside the plea because there was evidence he was too intoxicated to have committed the offense.

¶3 In his petition for review, Begay seems to be asserting he now possesses new evidence that would establish the victims had not been truthful about whether they had been “tailgating” him first, before he moved his truck behind their car and followed them. This argument was not presented to the trial court first; consequently, we will not address it on review. *See State v. Ramirez*, 126 Ariz. 464, 468, 616 P.2d 924, 928 (App. 1980) (declining to address issue not presented first to trial court); *see also* Ariz. R. Crim. P. 32.9(c)(1)(ii).

¶4 To the extent Begay is also claiming the trial court abused its discretion when it denied relief summarily on his claim of ineffective assistance of counsel, we are not persuaded. If his claim is that counsel did not adequately investigate the case for purposes of pretrial preparation, he has waived such a claim. *See State v. Quick*, 177 Ariz. 314, 316, 868 P.2d 327, 329 (App. 1993) (by entering guilty plea, defendant waives all non-jurisdictional defects, including claims of ineffective assistance of counsel not related to validity of plea).

¶5 “To state a colorable claim of ineffective assistance of counsel, a defendant must show both that counsel’s performance fell below objectively reasonable standards and that this deficiency prejudiced the defendant.” *State v. Bennett*, 213 Ariz. 562, ¶ 21, 146 P.3d 63, 68 (2006). “A colorable claim of post-conviction relief is ‘one that, if the allegations are true, might have changed the outcome.’” *State v. Jackson*, 209 Ariz. 13, ¶ 2, 97 P.3d 113, 114 (App. 2004), *quoting State v. Runnigeagle*, 176 Ariz. 59, 63, 859

P.2d 169, 173 (1993). Even assuming Begay is suggesting counsel’s purported failure to adequately investigate his potential defense of intoxication caused her to unwisely advise him to accept the plea, rendering it invalid, he has not sustained his burden of raising a colorable claim for relief. There was an adequate factual basis for the plea, and nothing before us establishes Begay’s alleged intoxication would have affected his culpability with respect to the charges. Rather, the record shows he simply became enraged because he had thought the victims were tailgating him in an aggressive manner. We note, in this regard, that at sentencing, Begay told the court he believed his behavior at the time was due to his having inhaled secondhand smoke ten hours earlier. Ultimately, however, he admitted he had gone “into a blind rage” that evening and tried to explain that when he had struck the windows with a crowbar, he did not realize who the occupants were but believed they were “a couple of males” who would “come out fighting.” He admitted, “I know it was wrong. I shouldn’t have done it,” blaming his conduct in part on a history of aggressive encounters and the fact that he was purportedly “in the tenth hour of that drug stupor.”

¶6 Finally, to the extent Begay claimed counsel ineffectively tried to raise a defense based on mental illness, there is no support in the record for such a claim. Rather, counsel effectively utilized Begay’s mental health issues to try to persuade the trial court to impose mitigated prison terms.

¶7 The trial court correctly dismissed the petition because Begay did not raise a colorable claim establishing counsel’s performance was deficient and prejudicial. *See Strickland v. Washington*, 466 U.S. 668, 687 (1984); *see also Bennett*, 213 Ariz. 562,

¶ 21, 146 P.3d at 68 (acknowledging defendant’s obligation to raise colorable claim of ineffective assistance of counsel to avoid summary dismissal of petition). Although we grant Begay’s petition for review, we deny relief.

/s/ Peter J. Eckerstrom  
PETER J. ECKERSTROM, Presiding Judge

CONCURRING:

/s/ Joseph W. Howard  
JOSEPH W. HOWARD, Chief Judge

/s/ Philip G. Espinosa  
PHILIP G. ESPINOSA, Judge